Intentional Parenthood: A Solution to the Plight of Same-Sex Partners Striving for Legal Recognition as Parents

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INTENTIONAL PARENTHOOD:  
A SOLUTION TO THE PLIGHT 
OF SAME-SEX PARTNERS 
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RECOGNITION AS PARENTS

YEHEZKEL MARGALIT*

ABSTRACT

One significant concern with the plight of same-sex partners attempting to receive legal recognition of their non-”traditional” family structure is the current inability to be recognized as the legal and/or additional parent of a non-biologically related child, either by adoption or following fertility treatments, in all jurisdictions. In many areas gay partners are not legally recognized as married, and they are not granted the same legal recognition as their heterosexual peers.

In this research, I explore the main approaches available today to same-sex partners in acquiring legal parentage and the inherent difficulties. I suggest a way to circumvent those difficulties by the official recognition of the dual maternity or paternity of the two partners by intentional parenthood or as I prefer to rephrase it - Determining Legal Parenthood by Agreement (DLPBA). In the research literature and in the judiciary, it is possible to find, here and there, implementation of this innovative suggestion in the gay parentage context, but, unfortunately, only within the narrow spectrum of fertility treatments incidents.

I also suggest the most appropriate, moderate and balanced implementation of this normative model in the abovementioned context and I will explain its possible expansion for its implementation in the gay adoption context. In my opinion, my normative model is a better,
sufficient, flexible, and just approach even for the resolution of the sensitive and complicated dilemmas for achieving legitimacy of gay parentage. That is where gay partners lack any biologic connection to the child and even their marital status is not legally recognized.

In order to provide a base for my contention, I first build the theoretical infrastructure that endorses DLPBA and explore its advantages and the general practical aspects of its implementation. I then investigate those aspects in the context of gay parentage either by adoption or following medical procedures. In the completion of the research, following my discussion, I open the question whether my suggested normative model can also be applied to the wider population of children who were born the “old-fashioned way” to heterosexual married couples.

INTRODUCTION

The number of unmarried same-sex partners has increased dramatically over the past several decades. Nevertheless, the struggle of same-sex partners to receive social and legal recognition for their non-”traditional” family has been a long and bitter uphill battle. This is illustrated in the struggles pertaining to recognition as a married couple, recognition as the second legal parent of the partner’s child, and in their ability to mutually adopt a child. This struggle accelerates the dramatic changes affecting the institutions of both family and parenthood. In the past, the classic family was defined sociologically as a pair of heterosexual parents living together under one roof with their children; however, sociological changes have led to a rapid and great transformation in the definitions of family, marital relations, parenthood and the relationship between parents and children.

The struggle for receiving legal recognition in a same-sex marriage is well known and has been fully discussed in the research literature.¹ I dedicate my research to one of the lesser known aspects of

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¹ See generally June Carbone, What does Bristol Palin have to do with Same-Sex Marriage?, 45 U.S.F.L. Rev. 313 (2010); Marcarena Sáez, Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World: Why “Same” is so Different, 19 AM. U. J. GENDER SOC. POL’Y & L. 1 (2011); Maura I. Strassberg, Foreword, 58 DRAKE L. REV. 879 (2010); Symposium, Introduction to Symposium on DOMA and Issues Concerning Federalism and Interstate Recognition of Same-Sex
this struggle. Due to their sexual orientation and lack of legal recognition of their marital status, same-sex couples have an extremely difficult time if they wish to adopt a child. In addition, they suffer from massive difficulties if their non-biologically related same-sex partners wish to become a legal parent of their own children. In stark contrast to heterosexual couples, whose marital and parental status are recognized by law, the lack of legal recognition of same-sex marital status causes a consequent lack of recognition of their parental status.

It should be emphasized that because the non-biologically related same-sex partner is not officially recognized as a second legal parent, he or she will be treated as legally foreign to the child when the legal parent dies or the marriage breaks up. Therefore, he or she will have no obligations or rights over the child. This miserable situation will be detrimental to the same-sex partner who will not receive legal recognition as a parent of the child, and the child will simultaneously lose both his legal and his sociological parent. Therefore, it is of paramount importance to acquire legal recognition as a second parent in order to legalize this unique child-parent relationship. This relationship often functions no worse if not better than a heterosexual child-parent context. Unfortunately, the legal system closes its eyes and prefers to ignore the actual situation while adhering to traditional family and child-parent structures, which many times seem old fashioned and outdated.

My goal in this research is to explore this problematic situation, to criticize the legal solutions found in the legal system, and to offer a much more sufficient, flexible, and just solution: Intentional Parenthood (hereinafter, Determining Legal Parenthood By Agreement (DLPBA)).

In the legal literature there are various calls for endorsing DLPBA as the main factor in acquiring legal parentage even by a non-biological and unmarried partner, but the vast majority of those calls are focused on the general issue of children who were born following fertility treatments and not in our specific situation – by same-sex partners.2

Moreover, even those studies which deal with the attempt to recognize same-sex partners as legal parents make it applicable only in the fertility treatments context and, in my opinion, are insufficient and unconvincing. On the one hand, due to various familial concerns, many scholars are inclined to restrict the capacity of DLPBA to very few situations. On the other hand, other calls which recognize the possibility of DLPBA enable too much “freedom of contracts” in this problematic situation. I am of the opinion, that those calls are too far-reaching and endanger the best interests of the child and his rights.

In my research, I suggest a moderate, balanced and sensitive normative model, which will combine DLPBA while preserving the best interests of the child and his welfare. We can achieve this ultimate goal by restricting the parental “freedom of contracts” to consider the best interests of the child and his welfare. In addition, most of the research in the homo-lesbian parenthood context has not dealt with adoption, the other main device for acquiring legal parenthood. Therefore, the main purpose of my research will be dedicated to the implementation of my moderate, balanced and sensitive normative model within the context of determining the legal parenthood of children who were born to same-sex partners following fertility treatments. Afterwards, I examine those various arguments which endorse recognizing same-sex partners as legal parents and look into the possibility of expanding that to the adoption context. My

(1986); The following articles are dedicated only to the fertility treatments context: Katharine K. Baker, Bargaining or Biology? The History and Future of Paternity Law and Parental Status, 14 CORNELL J.L. PUB. POL’Y 1, 69 (2004); Marjorie Maguire Shultz, Reproductive Technology and the Intent-Based Parenthood: An Opportunity for Gender Neutrality, 1990 WIS. L. REV. 297, 313 (1990).

research aims to fill in those double deficiencies.

The various calls to recognize the legitimacy of the authentically “new” family structures reinforce the existing urgency to reexamine the different devices through which it is possible to acquire legal parentage. When we undermine the traditional bionormative spousal structure and the accepted fact that every spousal relationship consists of only one male and one female, we also undermine the traditional bionormative child-parent structure that every child should have only one father and one mother. Thus, we (re)open the discussion to a profound and thorough investigation as who should be recognized as legal parent to a given child.

Indeed, following the undermining of the traditional bionormative family structure in the last decades, an increase can be seen in the legal recognition of different non-biological and unmarried parents. Thus, the legal system recognizes them as, more or less, the legal parents of the child in their care. But, for the continuation of our discussion, the traditional bionormative spousal structure is blurred first and foremost due to the recognition of same-sex marital status, especially the recognition of two lesbians as legal partners and legal mothers. We can trace the expanding legitimacy of this departure from the traditional bionormative family structure towards recognition of the validity of child-parent structures; especially, as legitimizing recognition of dual maternity of two lesbians and dual paternity of two gays. Unfortunately, this shift in the legal and social recognition is too slow and insufficient due to the many legal and social difficulties same-sex partners have to confront.


5. See Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L.J. 459, 474-82 (1990) (explaining a survey of the decrease in the traditional bionormative family structure and the complicated circumstances of determining legal parentage in the beginning of the 90’s of the last century).

6. Indeed, in the last decade there were given several of cases in recognizing parental rights to the domestic same-sex lesbian partner. See e.g., E.N.O. v. L.M.N., 711 N.E.2d 886 (Mass. 1999); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000); In re Custody of H.S.H.-K., 533 N.W. 2d 419, 421 (Wis. 1995); Polikoff, This Child Does Have Two Mothers, supra note 5, at 508-22.

It is well known that same-sex partners suffer from social infertility due to the fact that, even with the advanced medical technologies of today, in order to achieve pregnancy one should have a male sperm penetrate a female ova. Lesbians are more fortunate as opposed to gays, since they can produce their own ova and after purchasing or accepting sperm they can bear and deliver their own child. Nevertheless, even though it seems easy, it is actually a complicated, bumpy road and not as predictable due to various practical, ethical and medical reasons that I cannot discuss at length in this research. If this physical obstacle is not enough, the path towards becoming legal parents is blocked for same-sex partners in many other ways which are possible for heterosexual couples due to some claimed legal arguments. If the social and medical entities are often inclined to block fertility treatments by same-sex partners, especially for sperm donations and surrogate motherhood, society and the legal system block their way for adoption.  

8. For the possibility of creating child from only two mothers or fathers, for the challenge to the traditional parentage laws and for the call to determine the legal parentage of the conceived child by intentional parenthood as the preferred model, see Yehezkel Margalit, Orrie Levy and John Loike, The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood, HARV. J.L. & GENDER (2013) (forthcoming).

9. The discrimination and exclusion of same-sex partners from the right to use fertility treatments in order to fulfill their procreation right is one of the most popular issues in the research literature. For criticism of the practical procedures and the call to respect their intention and will to become mothers, see Catherine DeLair, Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women, 4 DEPAUL J. HEALTH CARE L. 147 (2000); John A. Robertson, Gay and Lesbian Access to Assisted Reproductive Technology, 55 CASE W. RES. L. REV. 323 (2004); Holly J. Harlow, Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor, 6 S. CAL. REV. L. & WOMEN’S STUD. 173, 183-84, 198-203, 207-14 (1996); Audra Elizabeth Laabs, Lesbian ART, 19 LAW & INEQ. 65, 98-100 (2001); Vickie L. Henry, A Tale of Three Women: A Survey of the Rights and Responsibilities of Unmarried Women Who Conceive by Alternative Insemination and a Model for Legislative Reform, 19 AM. J.L. & MED. 285 (1993); Justyn Lezin, (Mis)Conceptions: Unjust Limitations on Legally Unmarried Women’s Access to Reproductive Technology and Their Use of Known Donors, 14 HASTINGS WOMEN’S L.J. 185, 193-95 (2003).

Slamming the door in the faces of same-sex partners occurs either by the legislation of written law or by decisions of the judicial system. Therefore, in the current practice same-sex singles and couples are totally rejected from the option of adopting a child, with only one exception in difficult adoption cases when it is impossible to find heterosexual couples to adopt the child.

At the outset of my research, in the second chapter, I explore the available mechanisms in current laws that enable non-biological and unmarried same-sex partners to acquire legal parentage. These two mechanisms are adopting the child or requesting recognition as a legal parent through psychological parenthood. I enumerate the social and legal difficulties which cause the same-sex partners to eschew those mechanisms in order to be recognized by the law as legal parents. In chapter three I offer my normative model for DLPBA, which is a more appropriate and coherent solution to the plight of same-sex partners requesting legal recognition as parents. In my opinion, even in this unique context this is the preferred, efficient, just and flexible solution.

In order to fully understand how legal parenthood can be determined by agreement, I will first build its theoretical infrastructure through the media of historical and comparative law. I will then prove that even the current processes used to confer legal parenthood by prevailing law are indeed similar to conferring legal parenthood by agreement. I will enumerate the possible validity of the advantages in using my normative model and I will detail how it should be practically implemented. Only after we assimilate the flexibility and efficiency this model offers us for the general dilemmas of determining legal parentage, we could then proceed to the fourth chapter for the practical implementations of my model in the homo-lesbian context.

In this stage, I will examine the appropriate way to implement the model for DLPBA in the easier cases involving children born to same-sex partners using fertility treatments. Afterwards, I will examine the more difficult cases and the possible implementation of my normative model to acquiring legal parentage by adopting a child or in the context

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partners due to the unconstitutional contradiction with the Frank Martin Gill’s equal protection rights).

of second-parent adoption. At the end of my research, in chapter five, I will open the discussion as to whether it is the time to implement my normative model to determine legal parentage of all the children, even those who were born to traditional heterosexual couples via sexual intercourse. But, first of all, I will explore the two main roads to acquire legal parentage in the positive law and their problematic application for same-sex partners.

**THE EXISTING MECHANISMS TO RECOGNIZE GAY PARENTAGE AND THEIR INHERENT DIFFICULTIES**

**ADOPTION**

Introducing the Doctrine

Adoption of a child in general and specifically for second-parent adoption, where there is no biological and/or physiological connection with the child is, no doubt, the main road to establishing a child-parent relationship in this unique context. Indeed, for centuries adoption was the main mechanism for establishing a child-parent relationship recognized by law in most societies, in spite of the fact that it is based on a functional and not biological-genetic connection. The essence of adoption is the severing of the existing biological child-parent relationship from the natural-genetic parents in favor of a psychological child-parent relationship.

Although it is natural to assume that this child-parent relationship is based on a functional relationship, I would assert that it is based mainly on DLPBA, as I will elaborate later on. This assumption is valid in light of the demand of the law not to finalize the adoption

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process until a number of preliminary conditions are fulfilled. Among others, I will mention only the condition that deliberate and the free will of the various parents involved in the process was given. On the one hand, the biological parents gave their agreement for severing their relationship with their child and, on the other hand, the adoptive parents agreed to adopt the child as their natural child.

Similarly, even in a second-parent adoption, which means that only the same-sex partner is adopting his partner’s child, agreement of the biological parent is necessary besides the agreement of the adopting partner. Some researchers see it as the ultimate solution to the plight for receiving legal recognition of non-biological child-parent relationships, while others see it as a “statutory recognition of a fundamental family relationship”; therefore state adoption statutes must be interpreted to protect the security of those family units, rather than seek to punish the child for the parents’ life choices. The uniqueness of this process is inherent in the fact that the same-sex partner can adopt the child of his domestic partner without severing the existing biological child-parent relationship as in the other adoption options. Thus, until 2009, those couples could adopt the child of their

13. For contractual aspects of the adoption process, see Baker, Bargaining or Biology, supra note 2, at 49, 52; Sharon S. v. Superior Court, 31 Cal.4th 417, 446 (2003); Shultz, supra note 2, at 320-21.


15. See Emily Doskow, The Second Parent Trap: Parenting For Same-Sex Couples in a Brave New World, 20 J. JUV. L. 1, 15-21 (1999) (for the extreme importance of legal recognition of this adoption); See Jason N.W. Plowman, When Second-Parent Adoption is the Second-Best Option: The Case for Legislative Reform as the Next Best Option for Same-Sex Couples in the Face of Continued Marriage Inequality, 11 SCHOLAR 57 (2008) (for the premise that this adoption process is inferior and for a call to legislators to recognize parental rights of those partners without any need to officially adopt them); See Ruthann Robson, Making Mothers: Lesbian Legal Theory & the Judicial Construction of Lesbian Mothers, 22 WOMEN’S RTS. L. REP. 15 (2000) (for the popularity of second-parent adoption amongst lesbian couples); See Lynn D. Wardle, Comparative Perspectives on Adoption of Children by Cohabiting, Nonmarital Couples and Partners, 63 ARK. L. REV. 31 (2010) (for the legal and social-biological differences between heterosexual married adopting couples and unmarried adopting couples, include same-sex partners).

domestic partner in more than half of the states in the United States\textsuperscript{17}

The Challenges of the Doctrine

Although adoption for heterosexual couples is most popular, this process for same-sex partners is very often impossible. A number of states ban adoption by homosexuals in any context, making the adoption by a partner explicitly unavailable for homosexual couples.\textsuperscript{18} Each state has a different approach to this issue. Thus, the view can be easily changed by just crossing state lines and even within a given state the legal outcome of the courts can be totally different. Therefore, it is almost impossible to predict the decision of the court. Unpredictable legal outcomes are always detrimental to the sides in the adoption process and for the child who is up for adoption. This is due to the ambiguity surrounding the possibility that the court will recognize same-sex partners as legal parents of the adopted child. Moreover, even if the desired adoption decree is given, it should be clear that other states of the U.S. will not recognize it, if according to their legislation this form of adoption is banned.

In addition, even in a state where society and the legal system recognize the option of second-parent adoption, homo-lesbian couples may reject entirely the process for several reasons. Firstly, it is well known that the adoption process includes an intensive legal invasion into every aspect of the personal life of the spouses. This is to make sure that the spouses meet all the requirements for adoption by following the rules of the legal and welfare entities. This sort of insensitive invasion by state institutions into their very personal spousal relationship is rejected by the vast majority of the gay community. Therefore, they often prefer to skip the process entirely.\textsuperscript{19} Secondly, the requirement to ask for public and legal recognition of

\textit{of the Uniform Probate Code, 96 CORNELL L. REV. 139, 144-50 (2010)} (for an updated survey of the complicated legal practice that same-sex partners have to confront).

\textsuperscript{17} See In Your State, LAMBADA LEGAL, http://www.lambdalegal.org/states-regions (last visited May 3, 2013) (for an online internet survey of the existing legal laws with hypertext to various states throughout the U.S.); Beekman, \textit{supra} note 15, at 143-45 (for a legal academic survey of this data).

\textsuperscript{18} See Brynne E. McCabe, \textit{Adult Adoption: The Varying Motives, Potential Consequences, and Ethical Considerations}, 22 QUINNIPIAK. PROB. L.J. 300, 303-04 (2009).

\textsuperscript{19} See Julie Shapiro, \textit{A Lesbian-Centered Critique of Second-Parent Adoptions}, 14 BERKELEY WOMEN’S L.J. 17, 29-36 (1999) (for a lesbian-centered critique of this process).
their personal lives contradicts their concept of rejecting public acceptance from which they are excluded as a persona non grata. This is due to fear, anxiety, and even hatred of the state which doesn’t recognizes the legitimacy of their chosen family structure.20

Even in second-parent adoption we can find obvious legal obstacles, from both the legislative and judicial systems. In many states of the U.S, there is no legal permission for this type of adoption; therefore, this central device is not available for those who look for legal and social recognition of their relationship.21 Nevertheless state adoption laws often have a spousal and/or stepparent exception, which allows second-parent adoption to proceed without severing the biological parent’s legal parent-child relationship.22 It is worth noting that this exception does not provide a solution to most same-sex couples who are living in states that do not recognize same-sex partnerships.

This problem is even greater and is caused by general homophobia and public anxiety that this legal recognition will lead to a slippery slope which will end in full recognition of same-sex marital status. This is the reason that in some jurisdictions there is a legal presumption that this same-sex adoption is detrimental to children. Although in some states this presumption is refutable, in others it is no

20. See Maxwell S. Peltz, Second-Parent Adoption: Overcoming Barriers to Lesbian Family Rights, 3 MICH. J. GENDER & L. 175 (1995) (for the conclusion that due to the sophisticated trait of this process it is hardly a preferred solution to this problem); See Polikoff, A Mother Should Not Have to Adopt Her Own Child, supra note 12 (for the conclusion, that due to the sophisticated trait of this process, it is hardly a preferred solution to this problem).

21. See Plowman, supra note 14, at 66-67 (for a discussion of states where this practice is prohibited); See MISS. CODE ANN. § 93-17-3 (West 2004); FLA. STAT. ANN. § 63.042 (West 2007); UTAH CODE ANN. § 78B-6-117 (West 2008) (for the legislation of those states); See Jeff LeBlanc, My Two Moms: An Analysis of the Status of Homosexual Adoption and the Challenges to its Acceptance, 27 J. JUV. L. 95 (2006) (for a survey of this issue); For a more recent analysis, see James Healy, Band-Aid Solutions: New York’s Piecemeal Attempt to Address Legal Issues Created by DOMA in Conjunction with Advances in Surrogacy, 31 PACE L. REV. 691, 699-700 (2011); Christopher Colorado, Tying The Braid of Second-Parent Adoptions—Where Due Process Meets Equal Protection, 74 FORDHAM L. REV. 1425 (2005) (for an analysis of the constitutional ramifications of this process); See Id., at 70-71 (for a list of legal rulings where this practice was prohibited); The leading rules are the following: Lofton v. Sec’y of the Dep’t of Child. & Fam. Serv., 358 F.3d 804 (11th Cir. 2004); Georgina G. v. Terry M. (In re Angel Lace M.), 516 N.W.2d 678 (1994).

less than an irrefutable presumption, therefore there is no legal possibility to recognize the legal parentage of a domestic partner.23

**PSYCHOLOGICAL PARENTHOOD**

Introducing the Doctrine

Psychological parenthood is another significant legal device available for same-sex partners to acquire legal recognition of their parenthood. The genetic and/or the gestational models consider the inheritance of genetics and the birth delivery process as the main factors for determining parentage of the child. Those models are not concerned about whether those parents will fulfill their parental obligations. The psychological parenthood model maintains totally the opposite – the abovementioned factors are quite important but they are not the only ones. More important is fulfillment of different parental obligations, therefore only a person who acts as a de facto parent of the child will be recognized as his legal parent including parental rights.24

Practically speaking, the most common incidents of this model are foster and adopting families. Nevertheless, those doctrines did not exist in Common law25 in many societies, while in other jurisdictions they were recognized by law. Even today, in many legal systems, persons who are not genetically related to a given adopted child receive legal recognition as the child’s legal parents including various parental rights and obligations. Some scholars even define this model as a victory of psychological parenthood over genetic parenthood.26 Many researchers have pointed out the increasing legal recognition of psychological parenthood either by legislatures27 or judicial

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23. *Cf.* Polikoff, *This Child Does Have Two Mothers*, *supra* note 5, at 522-43.
27. *See generally* UPA § 201 (2000) (where numbers of legal avenues were suggested for determining legal parentage, including judicial decree, while using my normative suggested model); Likewise, *see* UPA § 204(a)(5) (amended 2002), 9B U.L.A. 311 (Supp. 2004) (for how a man can acquire legal parentage by psychological parenthood).
Thus, in the research literature there is a heated debate over this model as related to the legitimacy of pushing the borders of the “traditional” family structure. While using this model, a wide spectrum of people have claimed the borders of the traditional family and child-parent relationship should be expanded to include different and new structures.

A good example of this shift can be found in the growing demand to enable access to the courts in order to claim legal parental rights not only for nuclear family parents but also for members of the extended family. More important for our discussion is the increasing number of scholars who contend that the main road towards recognition of legal parentage of same-sex partners is psychological parenthood. This is because acquiring legal recognition while using this model in order to be legally recognized as the legal parent demands the approval of only a few elements to prove an existing child-parent relationship. That is opposed to the regular, complicated and painful way same-sex partners have to confront while applying to adopt a child via the prevailing practice.

Indeed, in the research literature and in legal practice, several doctrines are available for same-sex partners who want to be recognized as legal parents. Those doctrines are actually, more or less, variants of psychological parenthood. I will mention only those that are the most prominent: In loco parentis; De Facto Parent;}


29. Storrow, supra note 3, at 665-66; Leslie Joan Harris, Reconsidering the Criteria for Legal Fatherhood, 1996 UTAH L. REV. 461, 461 n. 1 (1996); V.C. v. M.J.B., 725 A.2d 13, 32 n.14 (N.J. Super. App. Div. 1999) (the court maintained that there was a mixed usage of the variants of psychological parenthood and therefore there is an urgent demand to limit this usage to only one way).

30. See Polikoff, This Child Does Have Two Mothers, supra note 5, at 502-08 (for this doctrine and its limits and leading rulings).

31. See ALI, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(c) (2000) (this doctrine has been recognized by the judicial system for at least the past two decades, but was probably strengthened by the ALI recommendations); See also Julie Shapiro, De Facto Parents and the Unfulfilled Promise of the New ALI Principles, 35 WILLAMETTE L. REV. 769 (1999); Gregory A. Loken, The New “Extended Family” – “De Facto” Parenthood and Standing Under Chapter 2, 2001 BYU L. REV. 1045 (2001); Sarah H. Ramsey, Constructing Parenthood for Stepparents: Parents by Estoppel and De Facto Parents Under the American Law Institute’s Principles of the Law of Family Dissolution, 8 DUKE J. GENDER L. & POL’y 285 (2001); David M. Wagner, Balancing “Parents Are” and
Psychological/Functional Parent; Equitable Estoppel and Equitable Parenthood.\textsuperscript{32} It is worthy to note that the last two variants are based mainly on contractual grounds, which support my proposition in this research to establish legal parentage based on the desire and agreement that are supposed to be consolidated in a legally official contract.\textsuperscript{33}

The Challenges of the Doctrine

Even the second available mechanism in current law that enables non-biological and unmarried same-sex partners to acquire legal parentage is prone to various difficulties. In my opinion, there are some primary arguments that reject the general option to establish legal parentage through psychological parenthood, even outside the context of our discussion – the recognition of legal parentage of same-sex partners.

Firstly, we have to ask a preliminary question: whether this model can indeed assist acquisition of full recognition of legal parentage \textit{ex-ante}? Or perhaps the most it can do is to \textit{ex-post} justify the exits given situation where the parent is already enjoying some parental rights, especially visiting rights.\textsuperscript{34} Some scholars maintain that based on the Fourteenth Amendment to the American Constitution, the American judicial system upholds clear hierarchic stages of legal parentage. Therefore, acquiring legal recognition through psychological parenthood, as a de facto parent for example, can award

\textsuperscript{32} See V.C. v. M.J.B., 725 A.2d 13 (N.J. Super. App. Div. 1999) (for a list of those variants); See generally Storrow, supra note 3; O’Bryan, supra note 3, at 1130-38 (for an update survey of the usage of courts in those doctrines in order to recognize the full or partial legal parentage of non-related biological partners); Courtney G. Joslin, \textit{Protecting Children(?) \& Marriage, Gender, and Assisted Reproductive Technology,} 83 S. CAL. L. REV. 1177, 1198-1219 (2010) (for the importance of those doctrines in order to preserve the welfare of a child and for a call to expand them); Polikoff, \textit{This Child Does Have Two Mothers, supra} note 5, at 483-86, 491-522 (for recognition of legal parentage of domestic same-sex partner).

\textsuperscript{33} Baker, \textit{Bargaining or Biology, supra} note 2, at 38 31 (holding that all of the doctrines are not derivatives of psychological parenthood, but are actually derivatives of my normative model, therefore one can explain them as based on contractual grounds as negotiation, consideration, reliance, and implied or explicit promises and so on).

\textsuperscript{34} Jacobs, supra note 3, at 436; Polikoff, \textit{This Child Does Have Two Mothers, supra} note 5, at 521 (asserting the need to expand the usage of in loco parentis doctrine not only in cases of stepparents but also for lesbian couples).
only the lowest degree of legal parentage, but can certainly not award full legal recognition. Thus, the benefit of using this doctrine is very limited and of little use.\textsuperscript{35}

It is worth mentioning that this insight is of great importance for me because we can infer from it that the law embraces the notion of partial parentage status. This unique legal status intermediates between full legal parentage and non-legal parentage. I dealt at length with this innovative option in previous profound and exhaustive research.\textsuperscript{36} In our context, the implication of this insight is very important when the domestic same-sex partner or a third party, who was involved in the process of bringing this child into existence, as a sperm or ova donor or surrogate mother, demands this partially legal status. Unfortunately, I can’t deal right now in length with this interesting subject and I will just briefly mention this normative possibility and later on I will enumerate several rulings in its favor.\textsuperscript{37}

\textbf{Secondly}, as with use of any other functional model, we should ask ourselves: what exactly is the degree of resemblance that we demand in order to award legal parentage as an equivalent to full legal parentage?\textsuperscript{38} This problem is far-reaching, especially if we see this model as being based upon preserving the best interests of the child. Who is authorized to determine when a given person will be recognized as the legal parent? If the strength of the exit of a child-parent relationship legally determines the degree of the given legal parentage, how can we compare two different relationships? Any attempt to base this model on empiric results from non-legal research fields will prove fruitless, due to the sensitive social and legal public concerns associated with expanding the borders of the traditional family. It is even impossible to agree on the reliability of those empiric

\textsuperscript{35}\hspace{1em} See Adam K. Ake, Unequal Rights: The Fourteenth Amendment and De Facto Parentage, 81 WASH. L. REV. 787, 790-804 (2006).

\textsuperscript{36}\hspace{1em} See YEHEZKEL MARGALIT, DETERMINING LEGAL PARENTAGE BY AGREEMENT (2011) (Ph.D. dissertation, Bar-Ilan University).

\textsuperscript{37}\hspace{1em} Id., at 194-98; \textit{Infra} notes 83-86.

\textsuperscript{38}\hspace{1em} See Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family, 104 HARV. L. REV. 1640 (1991) (for the general problematic characteristics of functionalism and for the advantages of ordering child-parent relationships through it rather than ordering spousal relationship); Edward Stein, Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism, 28 LAW & INEQ. 345, 365-69 (2010) (on functionalism as a possible device to recognize marital status of same-sex couples).
Moreover, even the most current psychological insights can easily change over a short time.

Thirdly, even if we hold that this model is derived, *inter alia*, from the desire to preserve the rights and the reliance interest of a parent who claims his legal parentage and that his activities will fulfill his aspiration, it is quite possible that his interests will clash with those of the biological parent. Whether removing the legal parentage of the latter is explicit or implicit in the process of recognition of the non-biological parent, there is a serious threat of an unreasonable intrusion into the biological parent’s privacy and violating his personal and constitutional rights.  

Fourthly, there is a real threat that following exaggerated and unreasonable usage of this model we will confront what is known in academic circles as parent inflation. Instead of preserving the uniqueness of a child-parent relationship we can expect a flood of legal suits and quarrels that are not consistent with the best interest of the child.

Fifthly, the most problematic aspect of using this model is the strong and bitter resistance of conservatives to any possibility of expanding the borders of the traditional family. Conservatives will vehemently reject every possible use of this model that is based on acquiring legal recognition for same-sex couples. In their opinion, non-traditional parentage is not consistent with the traditional family and parental structures.

True, the main obstacle I see in trying to acquire legal recognition for two same-sex partners who ask to mutually adopt child and to even just adopt their domestic partner’s child through psychological parenthood is the total rejection by the judicial system. Judges and legislators may prefer not to use this model even in cases outside the context of the same-sex debate because they fear it is another step to


40. See Ake, *supra* note 34 (for a similar premise).

41. See Wagner, *supra* note 30.

the possible recognition of their marital status. Thus, the general public’s antagonism is a main factor in rejecting non-biologically related relatives, such as a stepparent, grandfather and grandmother. Nevertheless in the given circumstances it is reasonable to recognize them as the child’s legal parent. After exploring the two main options and their intrinsic difficulties that are available for same-sex partners to acquire recognition as a legal parent, I will now turn to introduce my normative suggested model – DLPBA.

**INTRODUCTION TO THE SUGGESTED NORMATIVE MODEL - DLPBA**

**THEORETICAL INFRASTRUCTURE THROUGH THE PRISMS OF HISTORICAL AND COMPARATIVE LAW**

In my opinion, DLPBA is the main and legitimate approach to achieve parental recognition of same-sex partners either for an adopted child or in case the child was born following fertility treatments. Therefore, it is essential for me to present my rationale that supports this concept in light of historic and modern comparative law.

The historical and comparative research that I conducted enabled me to describe the developmental history of establishing legal parentage. This historical process reflects a clear shift from the monolithic and binary legal parentage of the traditional family and bionormative parental structures towards DLPBA. It is specifically relevant to my plan for recognizing legal parentage of same-sex partners. It is even relevant for resolving the many dilemmas involved for determining legal parentage. In Common law, legal parentage was given only to a married couple who raised their biological child. But, today, in my opinion, parental status should be expanded to also include intended parents (a priori, it is only proffered to a couple, but if the best interests of the child demand it, we can add or reduce the number of parents), who intended, agreed and gave birth to a child.

In my opinion, from time immemorial, determining legal parentage was the result of tension between will, intention and agreement to become a parent and different public concerns. While in the ancient world the main public concern was focused on preserving the traditional bionormative familial and parental structures, today this concern is annulled in favor of preserving the best interests of the child.

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43. Margalit, Determining Legal Parentage, *supra* note 36, at 162-68; See generally Yehezkel Margalit, *To Be or Not to Be (A Parent)? - Not Precisely the Question: the Frozen Embryo Dispute*, 18 Cardozo J.L. & Gender 355 (2012).
and his rights.

The major significance of the first approach to establish legal parentage, at least in the context of determining legal fatherhood of a married man, is the wish, intention and agreement to become a legal parent. The legal presumption of legitimacy is based on the intention and agreement of the male who marries a woman to serve as the legal father under all circumstances to her children. Thus, the legitimacy presumption maintains that legal fatherhood should be ascribed to the husband, even if he is not indeed the biological father of the child. Religion and law thus created a legal fiction,\textsuperscript{44} that granted legitimacy to a child assumes he was born in wedlock and therefore is the son of his mother’s husband.

Likewise, in my opinion, even psychological parenthood, the second approach to establishing legal parentage, is primarily based on the intention and agreement, sometimes expressed explicitly and in other cases implied, by the parent to accept legal parentage.\textsuperscript{45} Since the deeper meaning of acting de facto as the parent to the child expresses the intent to become de jure his legal parent by undertaking parental obligations and therefore to also receive parental rights.

This contention is also reflected in comparative law of the U.K. and U.S. jurisdictions. Unfortunately, I am unable to deal with this issue at length in this research. I will just mention that according to my explanation some of the prevailing practices can be understood much better. In many countries, there is a possibility of acquiring legal parentage when a person voluntarily accepts it through what is known as voluntary acknowledgment of paternity. Where this measure is recorded and subject to administrative supervision, the new child-parent relationship may be recognized, nevertheless there is no biological-genetic connection with the child.\textsuperscript{46}

\textsuperscript{44} See Rachel L. Kovach, \textit{Sorry Daddy - Your Time Is Up: Rebutting the Presumption of Paternity in Louisiana}, 56 Loy. L. Rev. 651 (2010) (for the problematic aspects of the modern adhering to this legal fiction).

\textsuperscript{45} Baker, \textit{Bargaining or Biology}, supra note 2, at 31-38.

Similarly, it is possible to achieve the same goal by receiving a legal decree from the court which will finalize the will and intention to become the (second) legal parent of the child. That is generally common in current legal practice concerning recognition of second legal parentage for heterosexual couples. In my opinion, we should also implement this process in recognizing legal parentage of same-sex partners adopting a child. Those abovementioned approaches and measures are only examples to the central and deep meaning that society and the judiciaries are giving to the agreement, desire and will of a person wishing to become a legal parent. The ultimate understanding of those prevailing practices is, undoubtedly, DLPBA. In other words, in spite of the rhetoric and the unified legal understanding of *prima facie* rejecting any recognition of DLPBA, my description teaches us that de facto society and the legal system implicitly acknowledge the validity of this possibility.

And still in the vast majority of incidents the judiciary seeks to limit the range of DLPBA implementation only within the traditional family structure and only in cases of fertility treatments. I want to invalidate these two premises in this research. In my opinion, intentional parenthood can determine legal parentage within the context of same-sex partners and not only concerning fertility treatments but also in other scenarios such as adoption following the will and the intention to become parents. In addition, it sounds reasonable to me that DLPBA can determine legal parentage even within the broader context of children who were born following sexual relations.

**AGREEMENT AS THE MAIN FACTOR IN DETERMINING LEGAL PARENTAGE**

As it should be known, agreement has always been the main factor in contract law. In my opinion, it should also be the same in family law, as it is gathering strength today to determine legal parentage. That is also true in establishing a homo-lesbian parentage context, especially when the child was born due to fertility treatments, where the agreement is clear and deliberate. Therefore, agreement should be the main factor in establishing legal parentage and should

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implementation of this process in Texas); Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments At Birth*, 40 U. BALTIMORE L. REV. 53 (2010) (for the urgent need in improving the implementation of this process).
not just be another factor among all the others. That means that the parent who intended, agreed and wanted to become a parent should receive legal parentage status, including parental obligations and rights.

In addition, normatively speaking, this shift towards recognizing the agreement as the main factor in determining legal parentage fits well into the commonly known shift of increasing freedom of contracts of the individual family members while weakening the marital status itself. Also, in my opinion, DLPBA conforms to the growing interest in human rights. That is true within the context of same-sex partners whose spousal and parental rights are not the same as those that heterosexual partners traditionally receive. The current interest in human rights is one of the main derivatives of the privatization of the family, especially in the need and ability for self-fulfillment and execution of procreation right. Moreover, even if my suggested normative model will not be accepted in its entirety, a deeper investigation into the various models offered for determining legal parentage teaches us how much they conform, more or less, to DLPBA.47

Regarding legal parentage as modern status would be the best response to any possible argument against my suggested normative model that it severely weakens legal parentage. According to this innovative approach we will, on one hand, accept DLPBA, to opt-in or opt-out fully or partially from the legal parentage status. But, on the other hand, no child will be left without two legal parents or with too many parents if his rights and best interests demand it. In addition, sociological and legal developments weaken the commodification argument against my model and the traditional rejection of baby markets include the feminist aspect of those claims.48

THE ADVANTAGES OF DLPBA

If the dilemma of the strength and efficiency of private ordering of spousal relationship is substantial, this dilemma, for some reasons, is

47. Yehezkel Margalit, Determining Legal Parenthood by Agreement as a Possible Solution to the Challenges of the New Era, 7 HAIFA L. REV. 347 (2012) (Heb.), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2232718 (for a general study of the various models offered in the research literature, for their advantages and disadvantages and for the reason they rate my model as the best model).

48. See MARGALIT, DETERMINING LEGAL PARENTAGE, supra note 36, at 98-122 (for an overview of justifications endorsing strengthening DLPBA and for refuting the criticism against it).
even more complicated in the realm of child-parent relationships. Nevertheless, in my opinion, there are several normative legal justifications in defense of giving more freedom of contracts to the spouses to agree on their parental status and its aspects. That is even truer for the issue of same-sex partners who seek to be recognized by law as the legal parents of the child, especially if he was born following fertility treatments. I will enumerate, inter alia, the following main argument – giving freedom of contracts in this context will enable same-sex partners to satisfy their desire for a child and will enlarge the circle of individuals who are eligible to fulfill their procreation rights.49

When the intentions of a man are deliberate and clear, they express, in contract law terminology, his reliance and expectation interests and therefore should be honored.50 An intended parent who intended and agreed to produce his child will probably be the child’s best parent.51 Public rigid regulation of legal parentage is not appropriate to the uniqueness of child-parent relationships in our non-genetic family era. DLPBA fits the general inclination of family law to resolve spousal quarrels privately before involving the courts. Even if some struggles will arise following DLPBA due to change of heart and/or changes of circumstances, in my opinion, modern contract law offers us efficient and good measures to cope appropriately with those challenges.52 We should prefer the intention factor in all dilemmas of determining legal parentage, since giving more freedom of contracts will increase the autonomy of individuals, their responsibility and self-

49. See generally Storrow, supra note 3; King, supra note 3, at 331-33, 346-47, 358; See generally Zgonjanin, supra note 3; Baker, Bargaining or Biology, supra note 2, at 41-43; See generally Swift, supra note 3.

50. See Shultz, supra note 2, at 323; Storrow, supra note 3, at 632-39 (intent is measured differently when a child was born following sexual intercourse).


52. Margalit, DETERMINING LEGAL PARENTAGE, supra note 36, at 66-138.
fulfillment, that society so admires.\textsuperscript{53}

The intention supplies us certainty and avoids ambiguity,\textsuperscript{54} since social policy demands that at least two legal parents will be obligated to raise the child from the moment of his delivery.\textsuperscript{55} Contractual models which recognize the initial agreement of the sides to the process will determine in advance who will be his legal parents. That way only gives us a prompt and easy solution to the struggles that may arise around the child.\textsuperscript{56} Freedom of contracts in voluntarily determining the range of monetary parental obligations will be much better honored than a forced court decree.\textsuperscript{57}

\textbf{PRACTICAL ASPECTS OF IMPLEMENTATION OF DLPBA}\textsuperscript{58}

The Content of the Agreement

In my opinion, DLPBA can establish not only the entire legal

\textsuperscript{53} See Shultz, supra note 2, at 303; Charles P. Kindregan & Maureen McBrien, 
\textit{Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos}, 49 \textit{VILL. L. REV.} 169, 206 (2004) (discussing the inevitable need to extend contract law to include cryopreserved embryos scenarios); See generally Flavia Berys, 

\textsuperscript{54} Shultz, supra note 2, at 307; Hill, supra note 2, at 417-18; See Kindregan, supra note 50, at 55 (for a discussion of the superiority of the contractual model due to the desire to avoid ambiguity that will cause the surrogate mother to keep the child in her hands); See also Sheila M. O’Rourke, \textit{Family Law in a Brave New World: Private Ordering of Parental Rights and Responsibilities for Donor Insemination}, 1 \textit{BERK. WOMEN’S L.J.} 140, 141-142 (1985) (discussing a call to recognize and enforce those agreements as binding contracts as the best option that will solve the existing problems in the sperm donation context).

\textsuperscript{55} See Baker, \textit{Bargaining or Biology}, supra note 2, at 61-62 (for the importance of establishing legal parentage of a child before his birth); Howard Fink & June Carbone, \textit{Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-Making}, 5 \textit{J. L. & FAM. STUD.} 1, 53, 55 (2003); See also Bix, supra note 50, at 1754, and Apel, supra note 50, at 663, 674 (discussing that non-recognition of freedom of contracts could damage the person who wishes to become a parent and will leave the child without caring parents).

\textsuperscript{56} Cf. Storrow, supra note 3, at 640.


\textsuperscript{58} The discussion in this subchapter is in brief and only for showing the preliminary implementation of my normative model. See MARGALIT, \textit{DETERMINING LEGAL PARENTAGE}, supra note 36, at 187-216, for a more detailed discussion of the measures possible to mitigate the practical difficulties that my model confront.
parentage status, but may also ascribe some aspects of it as well. The accurate range of the parental obligations and rights will be determined exactly by private ordering and restricted from public observation to preserve the best interests of the child. I will now elaborate my proposition. Legal parentage should be given to every individual who intends, wishes and agrees to become a legal parent of the child. If he intends to acquire full legal parentage, he will be given the full status. But, if it is his intent to acquire only partial legal parentage, he will be given only partial status in accordance with his initial agreement. In the latter scenario he will acquire the exact range of parental rights in accordance with the acceptance of his parental obligations. The accurate determination of his parental status, include the derived obligations and rights will be determined by a mutual private agreement but subordinated for public review, as I will elaborate further in this research.59

That is due to my desire to create an a-gender incentive which does not depend neither on sexual inclination nor on marital status. Only an individual who fulfills the needs of the child will enjoy full parental rights. A parent who chooses to partially accept his parental obligations, will receive partial parental rights. And an individual who prefers not to undertake any parental obligation accordingly will not acquire any legal status or parental rights. After accepting that legal parentage status is not monolithic and binary but is more diverse, this possible differentiation enables agreement to acquire full or partial legal parentage status. Therefore, we should ex-ante distinguish between three legal parentage statuses – full parentage, which includes the full range of legal obligations and rights; partial parentage, the acquisition of partial parental obligations and rights in accordance with their fulfillment; and non-parentage, which exempts from any parental obligations and rights.

The last option is similar to the common legal practice where a parent who doesn’t want or is unable to fulfill his parental obligation loses his legal parentage along with the custody of the child. In my opinion, this differentiation between those three stages of legal parentage fits well with the best interests of the child. That is due to my intention to provide a clear incentive for parents to undertake their full parental obligations in order to receive full parental status including various parental rights. The shift from a parent’s interests and rights in

59. See Margalit, Determining Legal Parentage, supra note 36, at 193-202 (for a thorough description of the desirable legal and/or administrative supervision).
favor of the welfare and best interests of the child will probably strengthen and not weaken those significant doctrines.

In my opinion, accepting the idea of DLPBA gives us the ability to recognize the possibility of partial parentage status. That innovation expands our legal options and gives the child an important option for preserving the existing child-parent relationship which gives monetary and emotional support without forcing the parent to accept full legal parentage. It is worth noting that the current legal system doesn’t recognize this intermediate status, therefore intended parents are forced either to surrender their legal parentage or to accept unwanted full parentage which may be detrimental to both sides under these special given circumstances.

The Limits of the Agreement – “Freedom of Contracts” Subordinated to the Best Interests of the Child

In my opinion, we should not enable nor recognize full freedom of contracts in this sensitive context. A well known dictum states that from time immemorial there is no actual real freedom of contracts. That is very true when we are dealing with our subject. In other words, even from ordinary contractual concerns we should be aware of external contractual obstacles and difficulties which may exacerbate individual cases. Therefore, we should reject out of hand any call to enable freedom of contracts without any legal and/or administrative supervision. Those calls, which very often come from the economic analysis of law scholars, are very dangerous and could be seen as detrimental to the different sides to the process. That is very true due to serious anxiety that an unfair agreement will particularly cause harm to the parties, especially to the socially and legally traditionally discriminated party, who very often are the women and children.

Thorough inspection and narrowing the limits of freedom of contracts reflected by DLPBA will take into consideration the child’s best interests and rights. Subordinating the parents’ interests to the child’s interests will send a clear message indicating the most important parameters for determining legal parentage. Particularly, this public supervision will not enable any validation of agreement that


could be detrimental to the best interests of the child. Moreover, freedom of contracts within the limits of the best interests of the child fits well into the two simultaneously opposite direction shifts in the fields of spousal and child-parent relationships. While in the first context we have witnessed in the last few decades a major shift in favor of giving more room for private ordering, in the latter context we can see the opposite movement. In my opinion, in the modern era, the best normative model is a modest one that enables freedom of contracts to establish legal parentage, on one hand, but at the same time, on the other hand, painstakingly preserves the best interests of the child while maintaining all his rights.

Legal parentage is indeed a modern status which makes room for intended parents to opt-in another legal parent or replace a legal parent. Experience and insights teach us that the interest of both society and the mother is not merely finding the true biological parents of the child and forcing them to fulfill their parental obligations. The concern of society in general is finding two persons who will undertake obligations. If there are two available parents, one of them can opt-out and another one can opt-in as a replacement. Therefore, limited and supervised recognition of the agreement won’t compromise the child’s interests and rights but enhance it since, after all, he will have two supporting and caring legal parents. It is worth noting that this has been adopted within the context of adoption, where we opt-out the biological parents and opt-in two adopting parents as replacements.

Even just adding another legal parent to the child, as is very common in our case, establishing same-sex legal parentage, could sometimes be very complicated and burdensome. Therefore, in order to ensure the best interests of the child and his rights the agreement must be supervised from the outset to prevent too many intended parents. Instead, only two individuals would acquire full parentage status and accept full responsibility of the child and satisfy his everyday needs. All other intended parents who also agree to fulfill those emotional and monetary needs would only receive partial parentage status and some parental rights, such as limited visiting rights.

The Strength of the Agreement

As mentioned above, acquisition of full legal parentage status includes parental obligations and rights. Any intended parent should

62. See Baker, Bargaining or Biology, supra note 2, at 48-49.
undertake legal parentage with its terms fully recorded in an official contract, as I will elaborate below. Therefore, after accepting the basic understandings that my normative model offers, in every case where a child was born not following sexual intercourse and with no explicit agreement, it is essential not to rely on any implied agreement. In my opinion, when a child is brought into the world following sexual intercourse, it is implied there was an agreement by both sides to become its legal parents and accept its associated parental obligations. This is true especially due to the public concern to preserve the best interests of the child and his rights, making an implied agreement sufficient. In contrast, a gay couple wishing to acquire full parentage status, or in order to acquire the non parentage status, we ask for explicit agreement only.

In other words, undertaking the parental obligations of the intended child is inferred from the implied understanding of the inevitable result of sexual intercourse and the need to take care of him. The sexual act and the bringing the child into the world, especially with a married couple, reflects their desire and agreement to become legal parents. This conclusion is supported by several researchers who maintain that the very act of sexual intercourse, in terms of contract discourse, yields the conclusion that this action is actually a reflection of an implied agreement to accept its serious ramifications. Likewise, various ethical and philosophical justifications endorse coercing a person who brings life into this world to acquire parentage status including its obligations. That is due to the following axiom – man is morally responsible for the outcome of his deeds which impact on the ongoing lives of others. Since the given significant meaning of voluntary sexual activity and the outcome of procreation in human life are obvious, those parents are morally obligated to undertake the commitments derived from their deeds.


65. See MARGALIT, DETERMINING LEGAL PARENTAGE, supra note 36, at 67-68 (for a survey of additional justifications claiming that implied agreements to undertake parental obligations is sufficient while when receiving parental rights there is a need for an explicit, bright, and clear agreement).
The Mechanism of Inspecting the Agreement

One of the most prominent practical problems of my normative model is to determine the timing for inspecting the terms of the initial agreement. When a couple asks to adopt a child, it is quite simple to understand their wishes, agreements and desires to become the legal parent to the child through the private or public adoption process. All they need to do is come up with an explicit agreement stating the various stipulations of the adoption that every side to the agreement is undertaking.

In stark contrast to that, when a child is born through sexual intercourse it is not clear when exactly we should inspect the implied agreement to become a legal parent and its explicit option of a contradicting agreement. The question is: should it be before sexual activity takes place, or perhaps just after the child is born and legal and/or administrative approval is given? In addition, in IVF treatments it should be determined when the initial agreement is crystallized and inspected; when the man inseminates the woman; when the ova is fertilized or only when the frozen embryos are placed in the woman’s womb. Besides that, very often it is impossible to evaluate the initial agreement merely because there was no explicit agreement.

The efficiency of my suggested normative model depends a lot on acceptance by the public. Therefore, it is very important to understand that only coming to an initial agreement expressed in an explicit contract, which will receive legal and/or administrative approval, will give it the necessary legal recognition. If the given agreement will not be sufficiently accurate, the entire process will have been in vain since traditional family law is inclined to reject any private agreement. In my opinion, the best way to avoid any procedural and contractual difficulties is to require a mandatory explicit contract that will determine the establishment of legal parentage with all its ramifications when either the child is adopted or born. The agreement is consolidated when the court gives its adoption decree, before sexual intercourse or starting fertility treatments. This explicit agreement will reflect the autonomy and the freedom of contracts to determine their private child-parent relationship.

It is worth noting again that without going accurately through this process and receiving the legal and/or administrative approval, there is no possibility to circumvent the existing family law’s pitfalls. Only balanced and moderated private ordering subordinated firmly to public insights is the most appropriate compromise. That is due to the need to
preserve the best interests of the child and his rights while carefully ensuring that the interests of the sides to the adoption process – the natural and adopting parents are not compromised. When fertility treatments are at stake we should strictly preserve the rights of the intending parents, the gamete donors and the surrogate mother - the different sides to this process. That means that the default determination of legal parentage will be according to the existing problematic public laws instead of the wanted private ordering. But if the couple fulfilled the various above-mentioned requirements, the legal and/or administrative approval would be given.

**THE PRACTICAL IMPLEMENTATION OF DLPBA IN THE GAY PARENTAGE CONTEXT**

**Caveat**

In the previous chapter I introduced the theoretical infrastructure and justifications that endorse DLPBA as the preferred model for determining legal parentage and its guidelines. I will now turn to look into the possibility of implementing my normative model for establishing gay parentage. I want to make it clear at the outset of my discussion that following the outlines I enumerated above, every private ordering of determining legal parentage must be subordinated to preserving the best interests and rights of the child. My insights below are relevant only as far as it has not clearly and undoubtedly been proven that adopting a child by same-sex partners or producing a child by fertility treatments is not significantly detrimental to his interests and welfare.

As far as I know, it has not been empirically proven that an adopted child will suffer from non-traditional familial and parental structures, and that the “missing gender” in his life will cause him any emotional harm. Therefore, there has never been any proven justification to reject adoption in this context. I have to admit that, *prima facie*, some criticisms concerning preserving the welfare, rights and interests of the child, as sociological, psychological and economical arguments, could be very intuitive and reasonable. But at the same time, we have very strong counter justifications, as the dignity of human life, the right of procreation and the desire to assist an abandoned child bereft of caring parents. Since we don’t have any unambiguous empirical evidence to reject *ab initio* my contentions concerning the feasibility of recognizing gay parentage, those
unproved claims could easily be found to be speculative, political, manipulative and powerless. But, if it will eventually be proved that those options are detrimental to the child, as it was recently (unsuccessfully) again claimed, we should cease those processes.

CHILD WHO WAS BORN FOLLOWING FERTILITY TREATMENTS

In my opinion, the most useful implementation of DLPBA is in the context of a child who was born following fertility treatments. It should be obvious that due to their social fertility, the majority of same-sex partners are inclined to use those medical procedures for becoming a parent, since they want the child to be genetically related to at least one of them. This is probably the major factor of the initial agreement. While having sexual intercourse in the familial and parental traditional bionormative structure does not necessarily yield a child, we should admit that the main goal of fertility treatments is bringing a child into the world. That is why we should empower the meaning of the agreement, since except for the initial agreement this ultimate result won’t occur. It is true that there are several additional partners to this process, but the initial agreement acts as the trigger. In those medical treatments, the offspring doesn’t appear by chance, but it is well known that he is desired and warmly wanted by the partners who expressed their intent right from the beginning.

The choice of the partners themselves to undergo this difficult and complicated procedure instead of giving up the idea or applying for adoption serves as a very clear indication of their longing and yearning to become parents. Those basic human impulses should make the partners eligible for legal parentage as society as a whole recognizes and appreciates their desires, wishes and deeds. Since those medical procedures magnify the place and power of the agreement for determining legal parentage, it is essential to give appropriate weight to the first stages of the planning, negotiating and to the reliance and expectation interests of the sides to this agreement. We should keep

67. See Shultz, supra note 2, at 300; King, supra note 3, at 370-71.
68. See Stumpf, supra note 2, at 194-97 (arguing for giving ultimate importance to the initial agreement, since it is the only trigger to the entire process); For a summary of this insight, see Hurwitz, supra note 2, at 1414-12; On the notion that the initial agreement is the only reason for bringing the child into the world, see Hill, supra note 2, at 414-15.
our promises, especially when we deal with fertility treatments, since the accompanying emotional stresses are enormous.69 This understanding can discourage any ineligible persons from entering those agreements.

Even in the IVF and disposition agreements context, nevertheless we aren’t dealing with DLPBA but only with enforcing an agreement to become a parent, can we enumerate additional justifications endorsing the centrality and validity of the agreement. Inter alia, I will enumerate the following: Those agreements indicate the two sides, the clinic and the judiciary certainty and predictability indicators of what were the initial desires. Those agreements reduce and mitigate the possible disagreements which may result while giving the appropriate instructions and tools on how to balance between the needs of both sides. In that intimate realm, the partners themselves and not the judiciary are the best judges to determine what should be done with their zygotes. Enforcing those contracts intensifies the seriousness of the sides and causes them to carefully negotiate the stipulations of their agreement. Respecting those contracts will assist the judiciary to enforce private agreements without intruding too much into the private sphere and dealing with the intimate desires of the partners. Those contracts supply us with a clear understanding as to what are the partners’ desires, which is essential for avoiding any unjust usage of the frozen embryos.

Therefore, in my opinion, accepting my normative model may improve the coherency and flexibility of determining legal parentage in all the aspects of the fertility treatments. This is true in the context of same-sex partners, where the legal system doesn’t recognize the legitimacy of their marriage. That also refers to non-recognition of the legal parentage of the domestic partner, since the law by itself doesn’t officially recognize any non-biologically related child-parent relationship. This lacuna urgently calls us to recognize gay parentage following the initial agreement that preceded the starting of the fertility treatments.70

69. See Hill, supra note 2, at 416.
70. Cf. Martha M. Ertman, Mapping the New Frontiers of Private Ordering: Afterword, 49 Ariz. L. Rev. 695, 700 (2007); Lesbian parentage can be agreed either through co-parenting agreements or visitation agreements, see Margaret S. Osborne, Note, Legalizing Families: Solutions to Adjudicate Parentage for Lesbian Co-Parents, 49 Vill. L. Rev. 363, 370-74 (2004); For a call to adopt the conclusion of my research as the main approach in recognition of lesbian maternity, see Harvey L. Fiser & Paula K. Garrett, It Takes Three, Baby: The Lack of Standard, Legal Definitions of “Best
Practically speaking, we should recognize the validity of a traditional or gestational surrogacy contract which was signed between two gays and a surrogate mother and derive the recognition of their dual paternity from that. This is reasonable since their mutual initial agreement, desires and wishes were to deprive the surrogate mother of her legal maternity while granting them with dual paternity. This is true where the child was born from the sperm of one of the partners and especially when they mixed their sperm in advance.

Similarly, we should recognize dual maternity of two lesbians who contracted a sperm bank or either an anonymous or known sperm donor. This is due to the initial understanding to revoke the paternity of the sperm donor in favor of the two women, who asked to have their child recognized with dual maternity. This is applicable also where only one of two lesbians donates both the ova and the pregnancy, nevertheless the second one is merely interested in becoming an additional legal mother to the child and she donates neither the ova nor the pregnancy. In this case, we should recognize their dual maternity due to their agreement and wishes. In those two basic scenarios we should ascribe the two domestic partners full parentage status.

The option of recognizing dual paternity or maternity could be done by applying to the court after the child is born and asking to be recognized as the two legal parents of the child. Actually, this possibility can exist much earlier while asking to receive a declaratory decree from the court or approval of the co-parenting contract at the beginning of the fertility procedures. This legal action is necessary in order to receive recognition as the legal parents of the child before he is brought into the world. This recognition is important to prevent the state, a third party or the domestic partner from contesting the validation of the agreement later on. Indeed, in my opinion, it is very


71. For a close normative call that is based on recognition of the initial agreement, see Dana, supra note 3, at 384. For a general call to recognize the legality of surrogacy agreements from modern contract perspective, see Yehezkel Margalit, In Defense of Surrogacy Agreements: A Modern Contract Law Perspective, WM & MARY J. WOMEN L. (forthcoming).

72. See generally Anne Reichman Schiff, Frustrated Intentions and Binding Biology: Seeking AID in the Law, 44 DUKE L.J. 524 (1994) (for another variant of this conversation); For a closer insight into the sperm donation context, see Schiff, Solomonic Decisions in Egg Donation, supra note 51, at 284-90.

important to make the agreement compulsory so that the courts, by exercising their judicial powers, can recognize dual paternity or maternity in suit cases.

Moreover, I believe that we should enable receiving this legal recognition even outside the judiciary by building a parallel administrative system. Due to the enormous and significant ramifications of establishing legal parentage and especially to ensure society’s desire that a given child whose father’s identity is known won’t be supported by the public, the American federal government has encouraged, in the past three decades, easing and simplifying the possibilities of voluntarily establishing legal paternity. The most prominent administrative measure is one of the most important innovations of the 2000 Uniform Parentage Act version as it was amended in 2002. It is all about giving an incentive and encouraging the various states of the U.S. to adopt non-legal but administrative measures to establish legal parentage as soon as possible just after the child is born either in the hospital or in a state agency.74

In my opinion, this measure is very useful in simplifying the process of establishing legal parentage for heterosexuals, but it is also applicable and very important in our context. Therefore, I suggest erecting a central administrative registry where the relevant medical information will be recorded, documented and stored. We should also document and save the parental agreement, in this register, concerning the child who was born following fertility treatments or merely adopted. The documentation of this register will supply the needed social and judiciary recognition of the legal parentage of the parents who asked to crystallize their initial agreement, desires and wishes by applying to this registry.

Every same-sex partner who wishes to become a legal parent should negotiate with his domestic partner and agree about the different terms of their desired legal parentage form. Afterwards, they should clearly document and save their mutual agreement by writing a legally official contract in order to achieve and preserve their agreement in the easiest, clearest and most comfortable way. This suggested measure will probably yield coherent and predictable legal outcomes and at the same time will mitigate the quarrels and

misunderstandings between the partners before the child is born or adopted. Those unique and important traits of the registry will reduce the number of disputes that normally end in the courts, since the ramifications of the initial agreement are well known and understandable. This entire process should be conducted, advised and supervised by an official clerk of the state, who will be trained especially for this capacity. This state clerk will supply the sides with further medical, contractual and ethical information while encouraging them to carefully and seriously negotiate their agreement.

But, perhaps this suggested implementation of my model is insufficient because it can even assist us to recognize the partial legal parentage of additional persons, as the “missing gender”, mostly the father, in the child’s life, besides the two domestic partners with all the obvious advantages of this recognition. The meaning of this option is the challenging possibility for the traditional bionormative structure as recognizing trio legal parentage of three persons – legal paternity/maternity of the gamete donor in addition to the dual paternity or maternity of the partners. This is mostly relevant in the case of dual maternity of two lesbians besides the legal paternity of a known sperm donor, but it is also possible in the scenario of dual paternity of two gays beside the recognition, fully or partly, of the surrogate’s legal maternity. It is all about what was agreed in the initial agreement.

In the case of two gays who have contracted with a surrogate mother and they stipulated that she will serve as the legal mother of the child or, alternatively, in case of two lesbians who have contracted with a known sperm donor while agreeing that he will serve as the legal father, we should respect and validate those agreements. The two partners will acquire full parentage status and the additional parent will receive only partial parentage status. That is because, on the one hand, invalidation of the agreement obviously harms all the sides and, on the other hand, recognition of full parentage status for all the three will complicate the daily life of this burdensome and unstable family structure.

Therefore, a sensitive, careful and practical implementation of DLPBA, that subordinates the initial agreement to stringently preserve the interests of the child, in gay parentage scenarios will endorse the following statement: in a dispute between the gamete donor and the genetic and intending parent, as homo and lesbian, we should respect their desires and wishes to grant the donor non-parentage status. This is
valid only as long as the interests of the child are not compromised in the given circumstances. But, if it will be proven that the “missing gender” is causing the child serious emotional harm, we should totally reject continuation of this option.

In the case of a lesbian couple and gay couple who intend to mutually raise a child, we should reject their request due to the cumbersome and complicated parental structure and the public concern that the interests of the child won’t be preserved satisfactorily. This parental structure may cause that at the end of the day the child will be deprived of his basic needs despite the large number of available parents. Under special circumstances, where it is better for the child to grow up in this unique family structure, we should enable it only in rare cases. Even though, only the two dominant parents in the life of the child will acquire full parentage status, while the other two will receive only partial parentage status, in accordance with the initial agreement.

Indeed, even a superficial perusal of the updated judiciary rulings will teach us about the slowly but surely increasing acceptance of the conclusions of my research that respect and validate the initial agreement to become legal parents of a child. Several leading cases were given with regard to recognition of the second paternity of the gay domestic partner that validated the gestational surrogacy contract between the gay partners and the surrogate mother who was inseminated with the sperm of one of the partners. The essence of those rulings is the legal recognition in depriving the surrogate mother of her legal maternity status while granting the two gays with dual paternity, even without ensuring the best interests of the child.75

In this context an additional leading case was recently given in Connecticut at the beginning of 2011. In Raftopol v. Ramey,76 the intended parents, a biological father and his same-sex domestic partner, brought action against a surrogate mother, who was carrying embryos created using eggs recovered from a third party egg donor and fertilized with sperm contributed by the biological father. They jointly asked for a declaratory judgment regarding validity of the gestational

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76. See Raftopol v. Ramey, 12 A.3d 783 (Conn. 2011); For a survey of this ruling and for the endorsement of defining parents by intention, see Linda D. Elrod, A Child’s Perspective of Defining a Parent: The Case for Intended Parenthood, 25 BYU J. PUB. L. 245, 266-69 (2011).
agreement under which the surrogate mother agreed to terminate her putative parental rights and to consent to adopt any resulting children by the father’s domestic partner. The Superior Court entered judgment finding the gestational agreement valid, found the intended parents to be the legal parents of the children, and ordered the Department of Public Health to issue a replacement birth certificate.

In the scenario of a lesbian couple who used an IVF procedure with the ova of one of them, I should mention the practical legal option of applying to the courts for a stipulated/declaratory judgment that will recognize their dual maternity as was several times successfully conducted by other lesbian couples even before the child was born. Likewise, in a number of leading cases, dual maternity was recognized following DLPBA (but from time to time in addition to other models). That occurred in the case of two lesbians, each of whom donated her biological share, one in donating her ova and the second in donating her physiological share by carrying the child to term. These stipulations were entered in a mutual agreement to raise him as their own. The court in several cases has recognized the agreement and validated the co-parenting contracts, even those that were signed only after the child was born.

It should be emphasized that those rulings which recognized the dual maternity of two lesbians are also applicable in cases where only one of them donated her biological share to bring the child into the

77. See Elisa B. v. Superior Court, 117 P.3d 660 (Cal.4th 2005); K.M. v. E.G., 117 P.3d 673 (Cal.4th 2005); Kristine H. v. Lisa R., 117 P.3d 690 (Cal.4th 2005); See also William J. Simmons, Note, Three’s Company for Lesbian Parental Rights and Obligations: A Discussion of Three California Decisions, 28 WOMEN’S RTS. L. REP. 163, 163-64 (2007); For a case dealing with the option of a complaint to declare the existence of parental rights, see Kristine H., 117 P.3d 692; For a summary of this issue, see generally Robin Cheryl Miller, Child Custody and Visitation Rights Arising from Same-Sex Relationship, 80 A.L.R.5th 1 (originally published in 2000); For practical advice for gay couples trying to receive early recognition of their dual paternity, see Susan Frelich Appleton, Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era, 86 B.U. L. REV. 227, 288-89 (2006).

78. For a discussion on the need for recognition of dual maternity, see Ryiah Lilith, The G.I.F.T. of Two Biological and Legal Mothers, 9 AM. U.J. GENDER SOC. POL’Y & L. 207 (2001); See also Ruth Zafran, More Than One Mother: Determining Maternity for the Biological Child of a Female Same-Sex Couple–the Israeli View, 9 GEO. J. GENDER & L. 115 (2008); See generally Kyle C. Velte, Egging on Lesbian Maternity: The Legal Implications of Tri-Gametic In Vitro Fertilization, 7 AM. U.J. GENDER SOC. POL’Y & L. 431 (1999), and Diana Richmond, Parentage by Intention for Same-Sex Partners, 6 J. CENTER FOR FAM. CHILD. & CTS. 125 (2005) (supporting the recognition of dual maternity based on the intending mothers’ initial agreement).
world whereas the second woman was merely an intending mother who wasn’t biologically related to the child. It is all about their understanding, as consolidated in their mutual initial agreement, that both of them would acquire full parentage status. Moreover, in two lesser known verdicts from the end of the 90’s, it was determined that we should respect the dual maternity of two lesbians following DLPBA. It was emphasized that there is no need to support this conclusion with other models, as ensuring the best interests of the child, since the first agreement was the most important factor.

Other leading rulings that support my conclusions can also be found in the past decade. Inter alia, I will point to the following remarkable cases – In 2005 the case In re Parentage of Robinson was given in New Jersey. In this case, the mother of the child conceived through alternative insemination using the sperm of an anonymous donor. The mother’s and her same-sex partner had registered as domestic partners in New York. Pursuant to the New Jersey Domestic Partnership Act, that partnership was recognized in New Jersey. They jointly sought to declare same-sex partner child’s other parent under the Artificial Insemination statute by pre-birth order establishing that the non biological parent was the second legal parent to the child. The court found that plaintiffs had availed themselves of every legal opportunity open to them to declare they were committed domestic partners, a married couple, and a dedicated family. The court could not discern any state interest that would preclude the partner from the protection of the law. Therefore, the court ordered that the partner was presumed to be the parent of the mother’s child.

In another similar case, Shineovich v. Shineovich, petitioner, the former partner of the respondent mother, sought a declaration that she was a legal parent of two children born to the mother during their

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79. See Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000); E.N.O. v. L.M.M., 429 Mass. 824 (1999); For a discussion in length about the importance of intent, initial agreements and emphasizing their significant innovativeness and importance for same-sex partners, see Storrow, supra note 3, at 668-78.


same-sex relationship.\textsuperscript{82} Both children were conceived through artificial insemination, and petitioner alleged that she consented. The Court of Appeals held that the presumption provided in Oregon that only a husband can become the parent of a child conceived by artificial insemination violated the Constitution. This is because it was not available to same-sex couples, who could not marry. The court saw no justification for denying that privilege on the basis of sexual orientation, particularly given that same-sex couples could become legal parents through adoption.

Those precedents are very welcomed in my opinion, since they fit well into the conclusion of my research that endorses recognizing the legal parentage of every parent who had intended and agreed to serve as a legal parent to the child.\textsuperscript{83} That is mostly true when the child was born following fertility treatments, where the wish, desire and agreement are strongest. I maintain that there should be no restrictions in the recognition of legal parentage as the contention maintains that it is only applicable in the traditional heterosexual context. Alternatively, we should recognize the legitimacy demand of any individual who intends, agrees and desires to become a legal parent either in the heterosexual or in the gay parentage context, even though it is not warmly welcomed by all judges and legislators.

This insight is applicable not only in partially \textit{ex-post} recognition of legal parentage of the second domestic partner who raises the child as his own, but we should recognize even \textit{ex-ante} his full legal parentage. There is no doubt that there is an enormous difference between the two scenarios and the latter option is much more complicated than the first one. But in this research, as mentioned above, I intend to create a gender model which is void of any sexual or ideological bias which will be possible to use in light of the dramatic shifts which are occurring in the modern spousal and child-parent relationships. That is, of course, within the limits of the best interests of the child. Moreover, similar to the conclusion of my research, for more than two decades, many scholars have claimed that in the given verity and diversity of family structures in the modern era, the legal policy should recognize the option that a given child may have more

\begin{itemize}
\item \textsuperscript{82} Shineovich v. Shineovich, 214 P.3d 29 (Or. App. 2009).
\item \textsuperscript{83} For a similar call to recognize the legal parentage of an anonymous semen donor if the parties agreed in advance for holding him up to his parental obligations, see Yehezkel Margalit, \textit{Artificial Insemination from Donor (AID) – From Status to Contract and Back Again to Status?} (under evaluation).
\end{itemize}
than two legal parents.84

A very interesting by-product of this possibility is abandoning the common concept that legal parentage is binary and should be ascribed to only two individuals, one father and one mother, as if it is all or nothing. Instead of that, we had better endorse the option to recognize the legal parentage of some individuals without any consideration of their gender, sexual inclination or marital status.85 Indeed, we can see today a slow but steady acceptance of this insight in the law of several states, such as Louisiana and Quebec, Canada.86 That is also obvious in the rulings of Quebec, England, Louisiana and California either in recognition of dual paternity in addition to a legal mother87 or in dual

84. In the context of adoption and fertility treatments, see Elizabeth Bartholet, Beyond Biology: The Politics of Adoption & Reproduction, 2 DUKE J. GENDER L & POL’Y 5, 5-6 (1995); In the context of non wealthy families, see Jane C. Murphy, Symposium, Reforming Parentage Laws: Protecting Children by Preserving Parenthood, 14 WM. & MARY BILL RTS. J. 969, 985 (2006); In the context of this discussion, see Laura Nicole Althouse, Three’s Company? How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families, 19 HASTINGS WOMEN’S L.J. 171 (2008); For an insight from a feminist and ethics of care point of view, see Matthew M. Kavanagh, Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard, 16 YALE J. L. & FEMINISM 83 (2004).


87. See Finnerty v. Boyett, 469 So.2d 287 (La.App. 2nd Cir.1985); Smith v. Cole, 553 So.2d 847 (La.1989); State on behalf of J.R. v. Mendoza, 240 Neb. 149 (1992); T.D. v. M.M.M., 730 So.2d 873 (La.1999); In re Nicholas H., 46 P.3d 932 (Cal.4th 2002); In re Jesusa V., 85 P.3d 2 (Cal.4th 2004); J.R. v. L.R., 902 A.2d 261 (N.J. Super. 2006); See also Nancy E. Dowd, Multiple Parents/Multiple Fathers, 9 J.L.
maternity besides a legal father.  

In other words, the tendency which is gathering strength in the positive legal system is pushing more and more towards the possibility of wide usage of my normative model, which claims to recognize the legal parentage agreed in advance by the same-sex partners. It is worth mentioning that only by accepting my suggested model will we achieve flexible, efficient and just recognition of the legal parentage of the sides to this process. That is impossible according to the existing traditional family law, which is no longer supplying a reasonable response to the modern complicated scenarios and the rapidly changing public desires and demands.

**ADOPTED CHILD**

In the previous subchapter I enumerated a variety of justifications that endorse recognition of dual paternity or maternity of the two partners following fertility treatments. They can also be found in the research literature. But, now I want to deal with the more complicated and challenging question whether it is possible to implement DLPBA for recognition of gay parentage in cases of adoption. This would follow the partners’ initial wishes, desires and agreement to mutually become the legal parents of the child by adoption. This dilemma is exacerbated if the child is non-biologically related to one or even none of the partners.

In this case we must distinguish between two *prima facie* similar but actually different adoption procedures. When dealing with second parent adoption, I contend that the interests of the child strongly support this option. Dual paternity or maternity in this scenario have not been shown to be detrimental to the child, as far as I know. On the contrary his interests seem to be improved if adopted by his parent’s domestic partner. The outcome of this process means that the child will receive a de jure and not only de facto additional legal parent who will probably care and support him both materially and emotionally.

FAM. STUD. 231, 232 n.3 (2007).


89. For researchers who maintain using DLPBA in the context of children who were born following fertility treatments, see supra notes 2-3.
Otherwise, as I elaborated at the beginning of this research, the second domestic partner will be legally treated as having no relationship to the child. He could not act as his legal parent either while the biological parent of the child is still alive nor even worse when he loses his legal capacity or passes away.

Therefore, in my opinion, generally speaking, each opting-in of an additional legal parent is desired and welcomed. That is reasonable when we are dealing with adding a second legal parent to a single parent family lacking the “missing gender”, except in special circumstances where the interests of the child demand rejecting this option. As opposed to that, when we are dealing with adoption of a child who is non-biologically related to each of his parents, I doubt whether we should apply DLPBA in this case, due to the possible pro and con counterclaims, as I will enumerate below:

Arguments in Favor of Recognizing Legal Parentage of the Adopting Parents

Firstly, the continuation of the exclusive recognition of legal parentage of only infertile, married heterosexual couples seriously harms all those individuals who don’t live in this traditional family structure. That unjustified discrimination can prevent them from becoming legal parents to the child, even though they deliberately agreed and desired to adopt him as their own child. In my opinion, only adoption of the essential and important normative proposal of my research will expand the usage of DLPBA for adoption and will enable a variety of individuals to be recognized by the legal system and by society as legal parents. This legal recognition provides predictability, stability and certainty to the child-parent relationship, which traditionally has been lacking. Only by strengthening this fragile and sensitive legal relationship additional same-sex partners will be encouraged to accept parenthood by adopting a child who wasn’t lucky enough to have had parents.

Secondly, every individual who intended, agreed and desired to become a legal parent of an adopted child, as it is very common for our gay parentage issue, is allowed to fulfill his basic desire and right to become a legally and socially recognized parent. The government should not block or even complicate his access to adoption as opposed to his heterosexual married peers. Same-sex partners, very often, undergo very emotional, humiliating and formidable trials in order to enjoy their basic right to marry and raise their child. Their right is even
magnified when compared to a heterosexual married couple who by accident produce “unplanned” and often, from their perspective, an “undesired” child. Adopting my normative model will mitigate and alleviate their agony.

Thirdly, and even most importantly, recognition of the legal parentage of those individuals as result of the adoption process fits well into the best interests of the child. That is because of the fact that this parent intended, agreed and desired to become a legal parent to this abandoned child. This intended parent has suffered many times from unsympathetic social and legal discrimination, but despite this arduous route has chosen to continue and never give up his passion to become the child’s parent. He therefore will probably be the best suitable parent to this child. Only formal recognition of his legal parentage will enable him to totally dedicate himself to the child’s welfare and raising him properly. As a just society that is the most reasonable and appropriate way to ensure the best interests of abandoned children.

Arguments Against Recognition of Legal Parentage of the Adopting Parents

On the other hand, we have several substantial counterclaims that endorse distinguishing between the central element of DLPBA, when the child is born following fertility treatments, as opposed to the adoption process where it is less prominent. Those claims undermine the argument for expanding the implementation of DLPBA to the context of same-sex partners’ adoption. I will enumerate, inter alia, the following:

Firstly, fertility treatments very often use genetic material of at least one of the partners involved in the process. That is not the case when we are dealing with adopting a non-biologically related child. Even I, who strongly endorse DLPBA, don’t reject the central and significant place of the genetic factor. Following the initial agreement, the intent and desire are supported when we use their own genetic material; there is no doubt that we should recognize them as the constitutive elements for establishing legal parentage. As opposed to that, in the adoption scenario, we are dealing with establishing legal

parentage only on the premise of the initial agreement, therefore my conclusions are not so reasonably applicable in this context and could be rejected.

**Secondly**, there is room for the claim that DLPBA is a constitutive element in establishing legal parentage only in the fertility treatments context. That is true due to the uniqueness, fragility and complexity of those medical procedures, therefore it makes sense to recognize the agreement, the desires and the wishes of the different sides to the process.\(^{91}\) That is not the case in the adoption context. This process has a longer history and is much better known and common. This is the reason why it is so stringently supervised by the state and why it is thoroughly regulated. This massive publicly regulated process can hardly adopt my semi-private suggested normative model of the child-parent relationship. Since the agreement is much weaker in this scenario, the possibility of recognizing it as the main factor for determining legal parentage is unconvincing.

**Thirdly**, in fertility treatments the child comes into the world only following the initial agreement reflecting the desire and wish of his progenitors to become his parents. In other words, those factors are the only reason for his existence, without them it is impossible to deal with any given child and contemplate his legal parentage. In stark contrast to that, when the dilemma of establishing the legal parentage of an adopted child is raised, the child already exists. It is clear that the initial desires, agreement and wishes of his same-sex intended parents are weaker and unconvincing and therefore can’t be seen as the sole factors in the legal debate.

**Fourthly**, desire, agreement and wish to produce a child following fertility treatments are crystallized even in the early stages of the conception through the birth delivery process. That is true in light of the fact that those procedures are very challenging and complicated to those who intended to become parents. That is obviously not the situation when the adoption is at hand. Even when the process is finalized and the adoption decree is given, no one can guarantee that those adopting parents will de facto realize their agreement and desire in fulfilling their parental obligations. I truly have to admit that even the adoption process is not easy, especially when gay parentage is the issue. Nevertheless, common sense endorses the understanding that in the fertility treatment the agreement is more deliberate, clear cut and

\(^{91}\) See Shultz, *supra* note 2, at 324; Anderson, *supra* note 72, at 293.
well known than in the adoption scenario and therefore can easily be seen as the main factor in determining legal parentage.

Nevertheless, in my opinion, careful calculation of the pro and con arguments inclines towards recognition of dual paternity and maternity even in gay adoption. That is following my basic arguments which is mentioned above that endorse the central and significant meaning of DLPBA in the various dilemmas where this question is raised. Moreover, the different justifications I just enumerated strengthen my contention that DLPBA should determine the legal parentage of the gay adopting parents. That means that we should respect and recognize the dual paternity and maternity of same-sex partners and we should not block their access to become legal parents through this process. But since there are some arguments which weaken and undermine the centrality and exclusivity of the initial agreement to become parents to the child, we should weaken their importance as the main factor for determining legal parentage. Therefore, we should thoroughly inspect and supervise the validation of this agreement through legal and/or administrative supervision. This stringent public inspection requires much higher standards to approve the fitness of the intended gay parents to this task and asks for clear evidence that the child’s interests will be well preserved.

In my opinion, on the one hand, we should a priori recognize the possibility of gay adoption while respecting their initial private ordering. But, on the other hand, we should carefully fix its limitations by restricting it to the public concern for the best interests of the child. This compromise is the only way to cope with modern opposing directions shifts – recognition of varied family structures while rigorously preserving the interests of the child. That means that the legal and/or administrative entity should validate the co-parenting agreement that was agreed at the outset of the fertility treatments or the adoption process only when it fits public concern.

As mentioned above, every individual who participated in the fertility treatments and intended to become a legal parent should be recognized as the legal parent to the child and receive full or partial parentage status. That is true when it is his own biological donation to the process, even when he is only interested in becoming a third legal parent to the child because the initial agreement called for producing the child only in that way. Therefore, the agreement can exclusively determine, fully or partially, the legal parentage even before the child is born. But, in contrast to that, since the same-sex partners’ agreement
to adopt the child is less convincing and restricted, that means that it is
less helpful for an interested third person to also become his legal
parent. Thus, there is no option to acquire this third party with full
parentage status in addition to the partners. It is even more complicated
when only partial parentage status is available. In my opinion, those
unique circumstances allow us to recognize him as a third and partially
legal parent only on rare occasions and after thorough and rigorous
legal and/or administrative supervision in accordance with the child
interests.

DLPBA AS THE MAIN APPROACH FOR ESTABLISHING THE LEGAL
PARENTAGE OF ALL THE CHILDREN?

Until now I have discussed the possibility of recognizing the gay
parentage of same-sex partners who asked to become legal parents
following fertility treatments or by adopting a child. I concluded the
previous discussion that granting legal parentage to individuals should
be based on an agreement reflecting the desires and wishes expressed
clearly and unambiguously. But, when we are dealing with adopting a
child, those factors are weaker and more fragile, therefore their ability
to determine exclusive legal parentage is less convincing. Similarly,
the justifications that support my normative model are less relevant
when establishing legal parentage of all the children who were born
after sexual intercourse, especially when it involves married couples.
That is because the continuation of the marital relationship fits into
procreation, one of the well known ultimate goals of the marriage.

In addition, we should take into consideration the technical
inability and reluctance of the judiciary to monitor the intimate spousal
relationship and speculate as to what was their initial agreements and
understandings. Moreover, so far, a very high percentage of children
are born within a traditional heterosexual marriage. There is an
intrinsic serious fear that men will use DLPBA to emotionally abuse
and economically exploit women to undertake solely all the parental
obligations and exempt themselves from sharing family
responsibilities. Besides that, if my normative model will be
implemented in all the cases for determining legal parentage of

92. Indeed, the UPA and the Model Act restricted themselves explicitly from
determining legal parentage of a child who was born following fertility treatments only
and excluding a child who was born following sexual intercourse. See UPA § 701, and
Model Act Governing Assisted Reproductive Technology § 601 (2008), available at
children, that may send a very negative message that men do not care to assume any responsibility for their genetic offspring. It is worthy to note that this sort of criticism had already arisen when a man was trying to exempt himself from any parental obligations since he was only a “sperm donor”.

When a child is born following fertility treatments it is very logical to use the initial agreement and understanding to determine not only who will serve as his legal parent but also what will be his accurate range of parental obligations and rights. That can easily be included in the agreement before undergoing those medical procedures. In addition, those specific procedures demand a great measure of certainty and predictability in implementing the initial agreement while preserving the interests of both sides to this process. Indeed, in modern legal practice there is no recognition of DLPBA in the cases of “regular” child birthing following sexual intercourse. That is the reason why the courts traditionally reject from the outset any possibility that the legal parentage to a child who was born in the “old-fashioned way”, at least in the sperm donation scenario, will be determined by agreement.

But, in my opinion, there is a significant importance for using a monolithic and unified mechanism to establish the legal parentage of all the children with no connection to the exact sexual inclination, marital status and gender identity, etc. of their parents. Ex-marital children have been suffering from discrimination and humiliation throughout the history of mankind as illegitimate children and bastards. Similarly, the children who were born in the emerging fertility treatments’ era suffer from the same problematic social treatment due to their legal ambiguous state as to whether those procedures should be treated as adultery and lust. In our modern era, the children of gays suffer from the same legal limbo and social stigma without concern for whether they were adopted or born as a result of a medical procedure.


94. See Shultz, supra note 2, at 323-24; Some scholars endorse this distinction, see Schiff, Frustrated Intentions, supra note 72, at 550-56, and Schiff, Solomonic Decisions in Egg Donations, supra note 51, at 278-80; For a close opinion and for the justification that this will abolish the unacceptable discrimination between two categories of children who were born in traditional and non-traditional families, see Baker, Bargaining or Biology, supra note 2, at 61-62.

95. See Budnick v. Silverman, 805 So.2d 1112, 1113-14 (Fla. Dist. Ct. App. 2002); See also Baker, Bargaining or Biology, supra note 2, at 2-11.
Therefore, in my opinion, my normative model is the most preferred, flexible, just and appropriate model for establishing legal parentage of the children, without any consideration for the spousal relationship of their parents. Only by applying my suggested model in the gay parentage scenario we can overcome negative discrimination.

In order to recognize the initial agreement and understanding of those who had sexual intercourse in order to bring the child into the world, we should require even higher standards of legal and/or administrative supervision. That requirement is much more reasonable when we are interested in establishing either full or partial parentage status. Therefore, only in rare cases, after receiving the legal and/or administrative approval which ensures that the child’s interests are preserved, we can assign non-parentage status to the biological parent. In addition, the existence or the absence of sexual intercourse should not make any difference in recognition of DLPBA, since at the end of the day we are dealing with an explicit, contradicting agreement that rejects the possible initial implied and inexplicit understanding to become a legal parent that even the interests of the child may support this convention.96

It should be noted that this practice is accepted already for determining legal maternity in the surrogacy context when we exempt the “natural” mother, the surrogate mother, from any parental obligations to the child due to the surrogacy contract. In contrast to that, the possibility of exempting a man who impregnated a woman in the old fashioned way from his parental obligations is much more complicated. Nevertheless, a first legislative precedent can be found in Quebec, Canada’s practice. The legislation there enables a man to sign a parental project where he can consolidate an agreement that will exempt him from his parental status even if he sires the child. But, if he is interested in legal recognition of his relationship to the child, a bond of filiation may be established during the year following the birth. A summary of the law is as follows: if the genetic material is provided by

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96. See Shultz, supra note 2, at 344-46; To see how this leads to the conclusion that with fertility treatments there is no option to establish legal parentage except in a narrow spectrum of cases, see Marsha Garrison, Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage, 113 HARV. L. REV. 835, 882 (2000), and Campbell, supra note 86, at 246 n. 102; For a compromise opinion which rejects Garrison’s opinion and maintains that although the major shifts and advanced technologies there is a vivid possibility of inferring the solution from traditional family laws and to implement their basic themes, see Storrow, supra note 3, at 601, 631-39.
way of sexual intercourse, a bond of filiation may be established, in the year following the birth, between the contributor and the child. During that period, the spouse of the woman who gave birth to the child may not invoke possession of status consistent with the act of birth in order to oppose the application for establishment of the filiation.97

CONCLUSION

In this article’s view, my suggested normative model, DLPBA, is presented to be the most preferred, flexible, just and appropriate model for establishing the legal parentage of all the children. That is without any concern about the accurate definition of the spousal relationship between the progenitors. Only by using my normative model we can defeat the vestiges of discrimination against children who were brought into the world not through the traditional “old-fashioned way”.

That is true when determining legal parentage of same-sex partners who asked to become the legal parents of a child either by adoption or by medical procedure. But, since the wish, desire and agreement to become legal parents is clear in the fertility treatments, we should respect and recognize them as the main factor for establishing either full or partial parentage status. Therefore, we can recognize the dual maternity or paternity of the two domestic partners and at the same token it is possible to recognize an additional legal parent who will acquire only some parental obligations and rights.

As opposed to that, when we deal with an adopted non-biologically related child by same-sex partners those factors are reduced, become more fragile and less persuasive, so their ability to conclusively establish legal parentage is in doubt. That means that legal parentage should be ascribed narrowly to those individuals who should be monitored by thorough legal and/or administrative supervision which will preserve the child’s interests. This approach will recognize only the two suitable domestic partners as legal parents of the child.

Similarly, the justifications that support my normative model are

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97. Civil Code of Québec, S.Q. 2002, c. 6, art. 538.2 (Can.) (which holds that either a married couple or a single may agree on disengagement of his legal paternity, if this agreement was validated lawfully); For a survey of the innovative aspects of this law, see Campbell, supra note 86, at 254-55; Robert Leckey, ‘Where the Parents are of the Same Sex’: Quebec’s Reforms to Filiation, 23 Int’l J.L. & Pol’y & Fam. 62, 65-69 (2009); Polikoff, A Mother Should Not Have To Adopt Her Own Child, supra note 12, at 226-29.
less relevant when the subject is a child born to a heterosexual married couple in the “old-fashioned way”. Respectively, we should impose very strict and firm legal and/or administrative supervision assuring that indeed the DLPBA is acting in favor of all the interests of the various sides to the agreement – the intending parents and the child whose legal parentage for which they are so longing.